

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

IN THE MATTER OF APPLICATIONS 51285,))
51436, 51437, 51438, 51439, 51440,))
51441, 52014, 52291, 53648, AND))
53649 FILED TO APPROPRIATE THE))
PUBLIC WATERS OF AN UNDERGROUND))
SOURCE, APPLICATION 52290 FILED TO))
APPROPRIATE THE WATERS OF SPRING))
VALLEY CREEK APPLICATIONS 54342,))
54343, 54344 AND 54345 FILED TO))
CHANGE THE PLACE OF USE AND MANNER))
OF USE OF THE WATERS OF UNDERGROUND))
SOURCES HERETOFORE APPROPRIATED))
UNDER PERMITS 28128, 28126, 28129))
AND 28125; RESPECTIVELY, WITHIN THE))
BUENA VISTA GROUNDWATER BASIN,))
PERSHING COUNTY, NEVADA.))

RULING

#3855

GENERAL

I.

Application 51285 was filed on September 9, 1987 by Walter J. Ausmus, Jack H. Nance and V.R. Calloway to appropriate 2.0 c.f.s. of water from an underground source for mining, milling and domestic purposes within the SE1/4 Section 31, T.29N., R.35E., M.D.B.&M. The point of diversion is described as being within the SE1/4 SE1/4 Section 34, T.29N., R.34E., M.D.B.&M.¹

II.

Applications 51436 and 51437 were filed on October 19, 1987 by James L. or Betty J. Noble to appropriate 1.0 c.f.s. of water each from an underground source for mining, milling and domestic purposes within the SW1/4 Section 35, and the S1/2 SE1/4 Section 36 all in T.29N., R.34E., M.D.B.&M. The points of diversion are described as being within the SE1/4 SE1/4 Section 34, T.29N., R.34E., M.D.B.&M.¹

III.

Application 51438 was filed on October 19, 1987 by James L. or Betty J. Noble to appropriate 1.0 c.f.s. of water from an

¹ Public record of the office of the State Engineer, see respective Application File.

underground source for mining, milling and domestic purposes within the SW1/4 Section 35, and the S1/2 SE1/4 Section 36, T.29N., R.34E., M.D.B.&M. The point of diversion is described as being within the NW1/4 SW1/4 Section 35, T.29N., R.34E., M.D.B.&M.¹

IV.

Application 51439 was filed on October 19, 1987 by James L. or Betty J. Noble to appropriate 1.0 c.f.s. of water from an underground source for mining, milling and domestic purposes within the SW1/4 Section 35, and the S1/2 SE1/4 Section 36, T.29N., R.34E., M.D.B.&M. The point of diversion is described as being within the NE1/4 NE1/4 Section 3, T.28N., R.34E., M.D.B.&M.¹

V.

Application 51440 was filed on October 19, 1987 by James L. or Betty J. Noble to appropriate 1.0 c.f.s. of water from an underground source for mining, milling and domestic purposes within the SW1/4 Section 35, and the S1/2 SE1/4 Section 36, T.29N., R.34E., M.D.B.&M. The point of diversion is described as being within the SE1/4 SE1/4 Section 34, T.29N., R.34E., M.D.B.&M.¹

VI.

Application 51441 was filed on October 19, 1987 by James L. or Betty J. Noble to appropriate 1.0 c.f.s. of water from an underground source for mining, milling and domestic purposes within the SW1/4 Section 35, and the S1/2 SE1/4 Section 36, T.29N., R.34E., M.D.B.&M. The point of diversion is described as being within the SW1/4 SW1/4 Section 35, T.29N., R.34E., M.D.B.&M.¹

VII.

Application 52014 was filed on April 14, 1988 by Emma Wagner to appropriate 1.0 c.f.s. of water from an underground source for mining, milling and domestic purposes within the S1/2 SW1/4 Section 31, T.29N., R.35E., M.D.B.&M. The point of diversion is

described as being within the NE1/4 SE1/4 Section 36, T.29N., R.34E., M.D.B.&M.¹

VIII.

Application 52290 was filed on July 5, 1988 by Emma Wagner to appropriate 1.0 c.f.s. of water from Spring Valley Creek for mining, milling and domestic purposes within the S1/2 SW1/4 Section 31, T.29N., R.35E., M.D.B.&M. The point of diversion is described as being within the NW1/4 SW1/4 Section 31, T.29N., R.35E., M.D.B.&M.¹

IX.

Application 52291 was filed on July 5, 1988 by Emma Wagner to appropriate 1.0 c.f.s. of water from an underground source for mining, milling and domestic purposes within the S1/2 SW1/4 Section 31, T.29N., R.35E., M.D.B.&M. The point of diversion is described as being within the SE1/4 SE1/4 Section 34, T.29N., R.34E., M.D.B.&M.¹

X.

Application 53648 was filed on June 30, 1989 by Esther Bennett (Butte Minerals, Inc.) to appropriate 1.0 c.f.s. of water from an underground source for mining, milling and domestic purposes within Lots 7, 8, 11 and 12 of Section 1, T.28N., R.34E., M.D.B.&M. The point of diversion is described as being within the SE1/4 SE1/4 Section 34, T.29N., R.34E., M.D.B.&M.¹

XI.

Application 53649 was filed on June 30, 1989 by Esther Bennett (Butte Minerals, Inc.) to appropriate 1.0 c.f.s. of water from an underground source for mining, milling and domestic purposes within Lots 7, 8, 11 and 12 of Section 1, T.28N., R.34E., M.D.B.&M. The point of diversion is described as being within the NE1/4 NE1/4 Section 3, T.28N., R.34E., M.D.B.&M.¹

XII.

Application 54342 was filed on January 17, 1990 by Esther Bennett, to change the place and manner of use of 0.23 c.f.s. of

water from an underground source heretofore appropriated under Permit 28128, Certificate 11592. The proposed use is for mining purposes within the NW1/4 SW1/4 Section 31, T.29N., R.35E., M.D.B.&M. The point of diversion is described as being within the SE1/4 SE1/4 Section 34, T.29N., R.34E., M.D.B.&M.¹

XIII.

Application 54343 was filed on January 17, 1990 by Esther Bennett, to change the place and manner of use of 0.13 c.f.s. of water from an underground source heretofore appropriated under Permit 28126, Certificate 11591. The proposed use is for mining purposes within the NW1/4 SW1/4 Section 31, T.29N., R.35E., M.D.B.&M. The point of diversion is described as being within the NW1/4 SW1/4 Section 35, T.29N., R.34E., M.D.B.&M.¹

XIV.

Application 54344 was filed on January 17, 1990 by Esther Bennett, to change the place and manner of use of 0.23 c.f.s. of water from an underground source heretofore appropriated under Permit 28129, Certificate 11593. The proposed use is for mining purposes within the NW1/4 SW1/4 Section 31, T.29N., R.35E., M.D.B.&M. The point of diversion is described as being within the SE1/4 SE1/4 Section 34, T.29N., R.34E., M.D.B.&M.¹

XV.

Application 54345 was filed on January 17, 1990 by Esther Bennett, to change the place and manner of use of 0.12 c.f.s. of water from an underground source heretofore appropriated under Permit 28125, Certificate 11590. The proposed use is for mining purposes within the NW1/4 SW1/4 Section 31, T.29N., R.35E., M.D.B.&M. The point of diversion is described as being within the SW1/4 SW1/4 Section 35, T.29N., R.34E., M.D.B.&M.¹

XVI.

Application 51285 was timely protested by Laurence A. Lacey, Esq., on the following grounds:¹

"Water rights are currently owned by Esther Bennett and Giles Corday source and proposed place of use, Esther Bennett has initiated legal action to enjoin applicant from using water rights and for other remedies. A temporary restraining order (copy enclosed) has been secured and a preliminary injunction hearing is scheduled in the Sixth Jud. Dist. Court of Pershing County for November 9, 1987. The water rights are currently assigned to Esther Bennett and Giles Corday or their predecessors in interest, Monarch Royalty, Inc. and/or Butte Minerals."

Therefore, the protestant requests that the application be denied and that an order be entered for such relief as the State Engineer deems just and proper.

XVII.

Applications 51439 and 51440 were timely protested by Laurence A. Lacey, Esq., on the following grounds:¹

"Water rights are currently owned by Esther Bennett and Giles Corday source and proposed place of use. Claims have been adjudicated to belong to Butte Minerals Inc., predecessor in interest to Esther Bennett and Giles Corday, and are currently assigned thereto. Copy of Quiet Title Judgement enclosed."

Therefore, the protestant requests that these applications be denied and that an order be entered for such relief as the State Engineer deems just and proper.

XVIII.

Applications 53648 and 53649 were timely protested by James L. Noble on the following grounds:¹

"Our Application Nos 51436-41 are senior. The source and place of use, mining claims, are owned by us."

Therefore, the protestant requests that these applications be denied and that an order be entered for such relief as the State Engineer deems just and proper.

XIX.

Applications 54342, 54343, 54344 and 54345 were timely protested by I.R.D. Inc. on the following grounds:¹

"Esther Bennett's claims to these permits and mining claims are not valid."

Therefore, the protestant requests that these applications be denied and that an order be entered for such relief as the State Engineer deems just and proper.

FINDINGS OF FACT

I.

The Nevada Revised Statutes provides that all water appropriated for beneficial use is subject to existing rights.²

II.

Existing water rights on the proposed points of diversion under the following applications as evidenced by permits and certificates include;¹

<u>APPLICATION</u>	<u>APPLICANT</u>	<u>EXISTING RIGHT ON POD PERMIT/ CERTIFICATE</u>	<u>OWNER OF RECORD (DWR)</u>
51285	Ausmus, Nance, Calloway	28128/11592	Bennett/Butte Minerals
51436	Noble	28127	Bennett/Butte Minerals
51437	Noble	28128/11592	Bennett/Butte Minerals
51438	Noble	28126/11591	Bennett/Butte Minerals
51439	Noble	28130	Bennett/Butte Minerals
51440	Noble	28129/11593	Bennett/Butte Minerals
51441	Noble	28125/11590	Bennett/Butte Minerals

² NRS 533.030.

<u>APPLICATION</u>	<u>APPLICANT</u>	<u>EXISTING RIGHT ON POD PERMIT/ CERTIFICATE</u>	<u>OWNER OF RECORD (DWR)</u>
52291	Wagner	28127	Bennett/Butte Minerals
53648	Bennett/Butte Minerals	28127	Bennett/Butte Minerals
53649	Bennett/Butte Minerals	28130	Bennett/Butte Minerals
54342	Bennett	28128/11592	Bennett/Butte Minerals
54343	Bennett	28126/11591	Bennett/Butte Minerals
54344	Bennett	28129/11593	Bennett/Butte Minerals
54345	Bennett	28125/11590	Bennett/Butte Minerals

An examination of the above referenced applications reveals that Bennett has existing water rights on the respective points of diversion under Applications 51285, 52291 and 51436 through 51441.

III.

Applications to Change 54342, 54343, 54344 and 54345 do not constitute a request for new appropriations of water, but rather seek to change the manner of use and places of use of existing rights.³

IV.

All of the points of diversion under the subject applications lie within the boundaries of the Buena Vista Groundwater Basin.¹

V.

By Order No. 732 dated October 2, 1979, the State Engineer designated and described the Buena Vista Groundwater Basin under the provisions of NRS 534 (Conservation and Distribution of Underground Water).⁴

³ State's Exhibits Nos. 15, 16, 17 and 18, Public Administrative Hearing before the Representatives of the State Engineer, October 1, 1990, hereinafter referred to as Exhibit or Transcript.

⁴ State Engineer Order No. 732, dated October 2, 1979.

VI.

The Nevada Revised Statutes provide that the State Engineer is authorized and may designate preferred uses of underground water within designated areas.⁵

VII.

Applications for permits to appropriate underground water within the Buena Vista Groundwater Basin for mining and milling purposes previously have been approved by the State Engineer under the preferred use provisions of the Nevada Revised Statutes.⁶

VIII.

The estimated perennial yield of the subject basin is estimated to be 10,000 acre-feet annually. Perennial yield is defined as the maximum amount of water that can be withdrawn each year over the long term without depleting the groundwater reservoir.⁷

IX.

Based upon information and records available in the office of the State Engineer, existing water rights in the Buena Vista Groundwater Basin total 31,392 acre-feet annually.⁸ The State Engineer records indicate that the total groundwater withdrawals under existing rights total less than 6,000 acre-feet annually.

⁵ NRS 534.120.

⁶ Public record of the office of the State Engineer. See files under Permits 44613, 44614, 44615, 45791, 48782, 48783, 48784, 48785, 48786, 48789 and 48790.

⁷ Water Resource Bulletin No. 13, "Geology and Groundwater Resources of Buena Vista Valley, Pershing County, Nevada", page 27.

⁸ Public record in the Winnemucca Branch office of the State Engineer, See Buena Vista Groundwater Basin Abstract.

X.

Senate Bill 526 (Chapter 469) allows the State Engineer to issue permits for a finite period of time under certain conditions, more specifically, that the perennial yield of the basin will not be exceeded during the period of use of the permit.⁹

XI.

After proper notice was given to all interested parties, an administrative hearing in the matter of the subject applications was held on October 1, 1990, before representatives of the State Engineer in Lovelock, Nevada.¹⁰

XII.

All parties of interest in the subject matter were notified by certified letter of the specific time and place of the administrative hearing.¹¹

XIII.

A copy of the Notice of Hearing was sent by certified mail to James L. and Betty J. Noble on August 22, 1990. A properly endorsed receipt for the certified notice is on file in the office of the State Engineer.¹²

XIV.

James L. Noble, Betty J. Noble and/or their designated representative, failed to appear at the specified time and place set forth in the Notice of Hearing.¹³

⁹ Senate Bill No. 526, Ch. 469 Stats. of Nev. (1991).

¹⁰ Transcript, page 6.

¹¹ State's Exhibit No. 1.

¹² Certified mail, Return Receipt No. P 448 147 572 filed under Permit 28125, Public record in the office of the State Engineer.

¹³ Transcript, pages 6, 77.

XV.

Subsequently, no evidence or testimony was received into the record to either support the Noble's protests to Applications 53648 and 53649 or refute the grounds of the protests to their Applications 51439 and 51440.¹⁴

XVI.

The proposed point of diversion of Application 52290 is located within the stream channel of Spring Valley Creek, a seasonal creek which drains into Buena Vista Valley. Evidence and testimony provided by Emma Wagner and J.R. Trout in support of said application revealed that the applicant's intention was to utilize the dry stream channel as a means of transporting water from upstream existing wells (Applications 52291 and 52014) to a downstream point of diversion (Application 52290) where it was to be captured by a pump set near the stream's bedrock. The water would then be distributed throughout the place of use under Application 52290 for mining and milling purposes.¹⁵

XVII.

An examination of the records on file within the office of the State Engineer finds that previous applications to appropriate Spring Valley Creek water have been denied by the State Engineer on the grounds of interference with existing rights, more specifically claims of vested rights for stockwatering purposes.¹⁶

¹⁴ Transcript, pages 1 through 97.

¹⁵ Transcript, pages 54, 55 and 59 through 65.

¹⁶ Public record in the office of the State Engineer, see files under Permit 28120 and Permit 28121.

XVIII.

The point of diversion under Permit 28127, which currently stands in the name of Esther Bennett/Butte Minerals in the records of the office of the State Engineer, represents one of the proposed sources of water under Application 52291.¹⁷

XIX.

In the matter of Application 52185, Jack H. Nance, representing said application testified that while he was aware of the existence of a prior water right (Permit 28128) at his proposed point of diversion, it was his understanding that this prior right was no longer active.¹⁸

XX.

A determination in the matter of the possible forfeiture of Permit 28125, Certificate 11590, Permit 28126, Certificate 11591, Permit 28128, Certificate 11592 and Permit 28129, Certificate 11593 was requested by James L. Noble on June 17, 1988.¹⁹ An administrative hearing was subsequently held on October 1, 1990, for the purpose of obtaining evidence and testimony in the matter of the possible forfeiture of the above mentioned certificated underground water rights. After reviewing the record of said hearing the State Engineer ruled that the Certificates were not subject to forfeiture and Certificates 11590 through 11593; inclusive, were found to be in good standing.²⁰

¹⁷ State's Exhibit No. 13A.

¹⁸ Transcript, pages 36, 37.

¹⁹ Public record in the office of the State Engineer, filed under Permit 28125.

²⁰ State Engineer's Ruling #3832, September 17, 1991.

CONCLUSIONS

I.

The State Engineer has jurisdiction of the parties and the subject matter of this action.²¹

II.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public waters where:²²

- A. There is no unappropriated water at the proposed source, or
- B. The proposed use or change conflicts with existing rights, or
- C. The proposed use or change threatens to prove detrimental to the public interest.

III.

The State Engineer concludes that the approval of Application 53648 and Application 53649 will not conflict with existing rights or prove detrimental to the public interest.

IV.

The State Engineer concludes that Applications 51285, 51436, 51437, 51438, 51439, 51440 and 51441 are in conflict with existing rights on the proposed points of diversion.

V.

The State Engineer concludes that the utilization of Spring Valley Creek as a means of transporting water from upstream underground sources for mining and milling purposes as envisioned under Application 52290 would impair the value of prior rights existing on the stream system.

²¹ NRS Chapters 533 and 534.

²² NRS 533.370(3).

VI.

The State Engineer concludes that the proposed manner of use, mining and milling, under Applications 53648 and 53649 are by nature temporary water uses with a total duty not to exceed 1500 acre feet annually. Said applications can be issued for a finite period of time without exceeding the perennial yield of the Buena Vista Groundwater basin.

VII.

The State Engineer concludes that the record does not provide substantial evidence in support of the protests to Applications 53648, 53649, 54342, 54343, 54344 and 54345 to the extent that said applications should be denied.

VIII.

The State Engineer concludes that the unexcused failure of John L. Noble, Betty J. Noble and/or their representative to appear at the specified time and place set out in the hearing notice, represents a lack of interest on their behalf to pursue their protests.

RULING

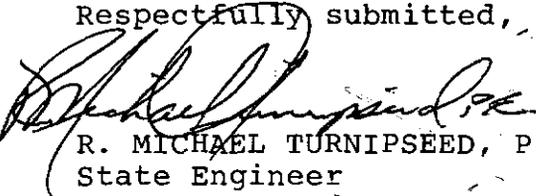
Accordingly, for the foregoing reasons, the protests to Applications 53648, 53649, 54342, 54343, 54344 and 54345 are overruled and Permits will be issued under Applications 54342, 54343, 54344 and 54345 subject to existing rights, upon payment of the statutory permit fees. Additionally, Application 53648 and Application 53649 will be issued under the provisions of Senate Bill 526 for a finite period of time, subject to existing rights and upon payment of the statutory permit fees.

Application 52014 is hereby approved subject to existing rights, upon payment of the statutory permit fees.

Application 52290 is hereby denied on the grounds that appropriation of Spring Valley Creek water for mining, milling and domestic purposes would conflict with existing rights and would be detrimental to the public interest and welfare.

The protests to Applications 51285, 51439 and 51440 are upheld and Applications 51285, 51439 and 51440, together with Applications 51436, 51437, 51438, 51441 and 52291 are denied on the grounds that additional groundwater withdrawals from the areas described in the applications would tend to impair the value of existing rights and be otherwise detrimental to the public welfare.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/MB/pm

Dated this 11th day of
December, 1991